

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary of  
the Interior, et al.,

Defendants.

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) No. 1:96CV01285  
) (Judge Robertson)  
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**DEFENDANTS' NOTICE OF RECORD CITATION IN RESPONSE TO PLAINTIFFS'  
NOTICE OF JUNE 19, 2007, REGARDING DISBURSEMENTS FROM THE  
INDIVIDUAL INDIAN MONEY TRUST**

During the June 18, 2007 hearing and in "Plaintiffs' Notice of Record Citations in Connection with Hearing on June 18, 2007" ("Plaintiffs' Notice") (Docket No. 3343, filed June 19, 2007), Plaintiffs' counsel referred to two documents, "Study of Check Negotiation Practices for Office of Trust Fund Management-Issued Checks - Financial Management Service, May 31, 2000" ("the Check Study") and "Report to Congress on Historical Account of Individual Indian Money Accounts, Department of the Interior, July 2, 2002" ("the 2002 Report"), as support for the proposition that there are "material differences in what Interior and Treasury defendants report has been withdrawn from the primary account at Treasury that holds Individual Indian Trust funds." Plaintiffs' Notice at 1; June 18, 2007 Hearing Transcript at 61-64. Plaintiffs' continued comparison of the Check Study amount disbursed through 325,731 paper checks between September 1, 1998 and August 31, 1999, namely \$177,481,567.91, and the "Disbursements" from the "Trust Funds" between October 1, 1998 and September 30, 1999, namely \$336.6 million, is inappropriate and flawed.

The scope of the two reports is different by design. The 2002 Report includes all disbursements from the trust fund which includes, among other modes of payment, paper checks, electronic fund transfers and automated clearing house transactions (“ACH”). The Check Study is limited to a study of disbursements by paper checks only. Check Study at 1.

Plaintiffs are aware of the flawed nature of their comparison because their own expert, Mr. Fasold, acknowledged during the 2003 “Phase 1.5” trial that non-check transactions might account for some or all of the difference. During cross-examination, Mr. Fasold was asked about the \$336.6 million figure in the 2002 Report. Transcript of May 16, 2003 AM at 6-7 (referring to Defendants’ Exhibit 56) (attached as Exhibit A). Mr. Fasold was then asked about an explanation for the difference between the \$336.6 million figure in the 2002 Report and the \$177 million figure in the Check Study.<sup>1</sup> Id. at 9. Mr. Fasold replied that “I have no – I don’t know the [reason for the] difference between those two amounts. I mean, hypothetically, ACH would account from some, all? I don’t know.” Id. Mr. Fasold acknowledged that disbursements from the trust funds could include ACH transactions or payments “[t]hat wouldn’t be checks.” Id. at 8.<sup>2</sup>

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<sup>1</sup> Plaintiffs raised this issue in their “Plan for Determining Accurate Balances in the Individual Indian Trust” (“Plaintiffs’ Plan”), filed on January 6, 2003. Docket No. 1714. In a discussion of “Disbursements,” Plaintiffs contended that “gross disbursement data is contradictory and inconsistent.” The footnote to this comment referred to the same difference highlighted in the current Plaintiffs’ Notice. Plaintiffs’ Plan at 51 n.99 (attached as Exhibit B).

<sup>2</sup> Although the Check Study is limited to disbursements by paper checks, the study contains valuable information concerning the negotiation rate of the checks issued. The study selected a sample of 3,255 checks from the 325,731 Office of Trust Funds Management (“OTFM”) checks issued between September 1, 1998 and August 31, 1999. From this sample, 555 checks were removed after further examination because OTFM had either voided the checks, the checks were not cashed by the payee or no online Federal Reserve Board electronic record was available. Check Study at 10. Only 27 checks were removed because the payee did not cash the check, a non-cash rate of 1% of the adjusted sample of 2700 checks. The 2,700

Dated: June 29 , 2007

Respectfully submitted,

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checks examined totaled \$1.227 million and the checks not cashed by the payee totaled only \$2,119.20, or 0.17% of the dollar value of the adjusted sample. Id. at 13-14.

CERTIFICATE OF SERVICE

I hereby certify that, on June 29, 2007 the foregoing *Defendants' Notice of Record Citation in Response to Plaintiffs' Notice of June 19, 2007, Regarding Disbursements from the Individual Indian Money Trust* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
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/s/ Kevin P. Kingston  
Kevin P. Kingston

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., : Civil Action 96-1285  
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Plaintiffs, :   
:   
v. : Washington, D.C.   
: Friday, May 16, 2003   
DEPARTMENT OF THE INTERIOR, : 10:06 a.m.   
et al., :   
:   
Defendants. :   
:   
- - - - - :

DAY 12 - A.M. SESSION  
BENCH TRIAL  
BEFORE THE HONORABLE ROYCE C. LAMBERTH  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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OFFICIAL COURT REPORTER

THERESA M. SORENSEN,

<p style="text-align: right;">Page 6</p> <p>1 A. Yes.</p> <p>2 Q. Okay. And did you examine the FMS Study referenced</p> <p>3 in footnote 99?</p> <p>4 A. Yes, I have.</p> <p>5 Q. Okay. And first of all, footnote 99 stated that the</p> <p>6 historical accounting plan for Interior reported \$336.6</p> <p>7 million of disbursements for the calendar year of 1999; do</p> <p>8 you see that?</p> <p>9 A. Yes.</p> <p>10 Q. Do you know if that's an accurate statement?</p> <p>11 A. That may not be because it may be the fiscal year</p> <p>12 1999, which I would imagine commences October 1st.</p> <p>13 Q. In fact, I believe --</p> <p>14 MR. WARSHAWSKY: If I may approach the witness,</p> <p>15 Your Honor?</p> <p>16 (Whereupon, Defendants' Exhibit Number 56 was marked</p> <p>17 for identification.)</p> <p>18 MR. WARSHAWSKY: Your Honor, I have handed the</p> <p>19 witness what has been marked Defendants' Exhibit 56. I will</p> <p>20 ask Mr. Fasold to review this and tell me if you have seen</p> <p>21 it before.</p> <p>22 THE WITNESS: It appears to be the same document</p> <p>23 that I have seen before.</p> <p>24 BY MR. WARSHAWSKY:</p> <p>25 Q. Specifically what are you referring to when you say</p>	<p style="text-align: right;">Page 8</p> <p>1 study that, as I recall, was quite scientific, statistical,</p> <p>2 and it described primarily the length of time it took from a</p> <p>3 check to be issued -- from at the time it was issued to the</p> <p>4 time it was negotiated for payment.</p> <p>5 Q. Looking specifically at footnote 99 in plaintiffs'</p> <p>6 accounting plan, this report is described as being, quote,</p> <p>7 as studying, quote, "all IIM U.S. Treasury checks issued for</p> <p>8 payment by OTFM from 9/1/1998 to 8/31/1999."</p> <p>9 It was a study of Treasury checks, right?</p> <p>10 A. Yes. I think it was commissioned by the Treasury</p> <p>11 Department. I'm not sure who originally --</p> <p>12 Q. And do you have an understanding as to whether</p> <p>13 disbursements can encompass payment forms broader than</p> <p>14 simply Treasury checks?</p> <p>15 A. I don't know for an absolute fact, but I understand</p> <p>16 some disbursements would be reflected as, for example, ACH</p> <p>17 transactions. I --</p> <p>18 Q. Those are electronic payments?</p> <p>19 A. Yes. That wouldn't be checks.</p> <p>20 Q. And aside from the fact that there is apparently --</p> <p>21 footnote 99 refers to somewhat different periods, doesn't</p> <p>22 it?</p> <p>23 A. Yes. Even if it were -- the report -- I will call it</p> <p>24 the report to Congress, if I may, shorthand, I don't -- I</p> <p>25 suspect that you're correct or the inference is correct that</p>
<p style="text-align: right;">Page 7</p> <p>1 the same document?</p> <p>2 A. The report to Congress on the historical accounting</p> <p>3 of individual Indian money accounts prepared for the United</p> <p>4 States Congress pursuant to H.R. Conference Report 107-234,</p> <p>5 Department of Interior, July 2, 2002.</p> <p>6 Q. So this would be the July 2002 report that was</p> <p>7 referenced in footnote 99?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And can you find the \$336.6 million figure</p> <p>10 that's referenced in the report? Do you know where that</p> <p>11 was?</p> <p>12 A. Yes. I believe it's on the page labelled A5, which I</p> <p>13 think is towards the back. I think it's one of the</p> <p>14 appendices labelled A5. It's entitled Trust Fund History -</p> <p>15 1972 through 19 -- I'm sorry -- 2001, Dollars in Millions -</p> <p>16 Current Dollars.</p> <p>17 Q. Now, footnote 99, the reference to the FMS Study, was</p> <p>18 that a review of disbursements?</p> <p>19 A. Would you repeat the question? Footnote 99 refers to</p> <p>20 two documents.</p> <p>21 Q. Right. And referring to the FMS Study, was that a</p> <p>22 review of disbursements?</p> <p>23 A. No. It was, I believe, entitled correctly -- or</p> <p>24 indicatively Study of Check Negotiation Practices for the</p> <p>25 Office of Trust Fund Management - Issued Checks. So it is a</p>	<p style="text-align: right;">Page 9</p> <p>1 these may be fiscal years and not calendar years. The two</p> <p>2 reports would be a month off, so they are not of identical</p> <p>3 periods.</p> <p>4 Q. Okay. You haven't made any attempt to determine</p> <p>5 whether the explanation for the difference between \$177</p> <p>6 million and \$336.6 million is related to, for example,</p> <p>7 electronic payments, have you?</p> <p>8 A. I have no -- I don't know the difference between</p> <p>9 those two amounts. I mean, hypothetically, ACH would</p> <p>10 account for some, all? I don't know.</p> <p>11 Q. I would like to also ask you, Mr. Gingold walked you</p> <p>12 through a number of GAO reports. Do you remember that? In</p> <p>13 Plaintiffs' Exhibit 51?</p> <p>14 A. Yes, I recall.</p> <p>15 Q. And he started, I believe, with the 1915 report on</p> <p>16 page 23.</p> <p>17 A. Yes, I believe that's accurate.</p> <p>18 Q. You had never read that report before; is that</p> <p>19 correct?</p> <p>20 A. No, I have not read it in its entirety. It's very</p> <p>21 voluminous, from my understanding. But I have not read it,</p> <p>22 no.</p> <p>23 Q. Well, have you read the section that was quoted -- I</p> <p>24 mean aside from yesterday, had you previously reviewed the</p> <p>25 section quoted in plaintiffs' plan?</p>

3 (Pages 6 to 9)



Plaintiffs' Plan quantifies Other revenues as the difference between the Department of Interior's estimate of total monies generated from Allotted Lands as presented in the Department's July 2, 2002 Report to Congress and Plaintiffs' quantification of monies generated from Allotted Lands in the above categories.

### **G. Disbursements**

The trustee-delegate has provided "gross disbursement" (recorded disbursements from the Individual Indian Trust without regard to validity of amount or receipt by the correct beneficiary) information covering various periods from various sources.

However, the gross disbursement data is contradictory and inconsistent.<sup>99</sup> Even if Defendants can establish gross disbursements, the fiduciary duty extends to establishing **valid disbursements** to individual Indian trust beneficiaries.

### **H. Interest**

The United States Government was required to pay interest on all monies generated from Allotted Lands and held for trust beneficiaries.<sup>100</sup> Plaintiffs have determined that the most appropriate index to compute interest on the monies generated from Allotted Lands was the long term corporate bond index.

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<sup>99</sup> The "Study of Check Negotiation Practices for Office of Trust Funds Management-Issued Checks," prepared by Financial Management Service on May 31, 2000, studied "all IIM U.S. Treasury checks issued for payments by OTFM from 9/1/1998 – 8/31/1999," which found such checks totaled approximately \$177 million. Notwithstanding time period differences, the figure is grossly inconsistent with the July 2002, Department of Interior Historical Accounting Plan which reports \$336.6 million of disbursements from 1/1/1999 – 12/31/1999 and would imply that only a fraction of the receipts of the Individual Indian Trust were disbursed in 1999.

<sup>100</sup> "All funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of individual Indians shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities with maturities suitable to the needs of the fund involved, as determined by the Secretary of the Interior, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable securities." (Feb. 12, 1929, ch. 178, Sec. 1, 45 Stat. 1164; June 13, 1930, ch. 483, 46 Stat. 584; Pub. L.98-451, Oct. 4, 1984, 98 Stat. 1729; Pub. L.103-412, title I, Sec. 103(a), Oct. 25, 1994, 108 Stat. 4241.).